IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHNNIE LEE COLEMAN, Appellant.	No. 37461-7-II UNPUBLISHED OPINION

Penoyar, J. — A jury found Johnnie Coleman guilty of a felony violation of a domestic violence no-contact order. Coleman argues that (1) the prosecutor committed misconduct by expressing a personal opinion about the witnesses' credibility and (2) he received ineffective assistance of counsel when his trial attorney failed to object to the prosecutor's statements. Concluding that the prosecutor did not commit misconduct and that Coleman does not demonstrate ineffective assistance of counsel, we affirm his judgment and sentence. [1]

FACTS

On September 30, 2007, a dispatch officer sent Officers Khanh Phan and Leslie Jacobsen to investigate a dispute over a vehicle at an apartment in Tacoma, Washington. When Jacobsen arrived on the scene, she observed Coleman and another man in the parking lot near a vehicle. The officers spoke with Coleman and the other man for a few minutes. Jacobsen then went into the apartment to talk to a female resident in order to determine the vehicle's owner. Phan stayed behind with Coleman for five to ten minutes and then also went into the apartment and talked to

[1] A commissioner of this court initially considered Coleman's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

the resident.

After speaking to the woman, Phan asked Coleman for his name and birth date and ran an identification check. A report came back that Coleman had a protection order preventing him from going inside the apartment. Phan also asked the woman in the apartment for her name and birth date and confirmed that her name was Beverly Featherstone, the woman named in the protection order. Phan then told Coleman that the car was not his, instructed him to leave, and reminded him of the protection order. Coleman eventually complied with the request and left. Phan informed dispatch that they had resolved the issue and the officers left.

About a half hour later, dispatch sent Phan back to the apartment.[2] When he arrived, Featherstone let him into the apartment. As Phan entered, he noticed Coleman talking on a cell phone while standing in the doorway of the sliding glass door. Phan recognized Coleman from the earlier encounter and arrested him for violating the court order. Phan spoke with Featherstone for 15 to 20 minutes during the second encounter.

The State charged Coleman with one count of domestic violence court order violation, or in the alternative, felony violation of a court order.[3] Featherstone did not testify at trial. At trial, the State asked Phan if he would recognize Featherstone if he saw her again, and he responded affirmatively. The State showed Phan a driver's license picture that he had not previously seen before. He identified the woman in the picture as Featherstone. Phan noted some differences between Featherstone's driver's license picture and her appearance that night. He noted that her

[2] Jacobsen did not return because dispatch had sent her to investigate another call.

[3] The State also charged Coleman with fourth degree assault, but on the State's motion the trial court dismissed the charge with prejudice before trial.

"hair is different," and that on the night in question, Featherstone's hair was collar-length, wavy, and brown, while the picture showed longer, dyed blonde, curly hair. 3 Report of Proceedings (RP) at 129. He described Featherstone as "very heavy-set," who was between 5'5" and 5'6" and estimated her weight at 200 pounds or more. 3 RP at 125. Her driver's license indicated she was 5'4" and 190 pounds. On cross-examination, Coleman's counsel asked Phan if Featherstone had any identifying marks or tattoos. Phan replied, "I didn't look at her." 3 RP at 126. He later clarified this statement, saying that he hadn't paid attention to any tattoos and had looked Featherstone in the eye, but had not looked at her overall body.

Jacobsen testified that she was not sure if the woman in the driver's license was the same woman she encountered on September 30. She testified that the face in the photograph was familiar and looked similar, but the woman had dark hair when Jacobsen saw her.

A deputy prosecutor testified that a no-contact order had been issued on April 18, 2006, which prohibited Coleman from contacting Featherstone. He also testified that Coleman had four prior convictions for violation of a no-contact order.

The jury found Coleman guilty of a felony violation of a domestic violence no-contact order. Coleman appeals.

ANALYSIS

First, Coleman argues that the prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by repeatedly stating his personal opinion about the strength and credibility of the officers' testimony. A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecutor's comments and their prejudicial effect. *State v. McKenzie*, 157

Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where a defendant fails to object to an improper comment, the error is considered waived unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. *Brown*, 132 Wn.3d at 561. To show misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 728, 252 P.2d 246 (1952)).

During closing argument, the prosecutor stated:

> You know, I suggest to you it's fair if you think maybe this is a little different than if I showed him some kind of like the thing they do on TV, you know, six pack of all the random people. Not what I am trying to prove. What I am trying to prove is that the person, right, on this driver's license is the person that he saw that night. That's what I need to prove, okay? So I didn't show it to him ahead of time. And he got it a little bit wrong, but *I think he mostly got it right, okay?*
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> Recognized the fact that the hair's different. And I encourage you to look at that color photograph. Does not show up on here, but I would call it golden; maybe you would call it something else. The point is *I think his description of the lady, the person that he talked to at her residence was very consistent with Officer Jacobsen's description.* And Officer Jacobsen got up there and she looked at this thing, and she was pretty careful about what she had to say, all right? "Well, you know, the face is a little rounder, maybe a little heavier, you know, looks familiar but I am not sure."
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> And the one thing I want you to take away from that, do you think she didn't know, right, what the right answer was for the State? Do you think she didn't know what I want her to say? Okay? You know. And what I suggest to you is, that she was very careful about what she said, because she wanted to be very careful about not overstating what she knew her knowledge, what it was and what it wasn't. Okay? And I suggested yesterday to you that's pretty good evidence of credibility. She knew what the right answer was.

3 RP at 173-74 (emphases added). Coleman did not object. Then during rebuttal argument, the prosecutor stated:

> And the point, I think it's interesting, is that her description of how the person that she remembers differs, right, from the photograph is completely consistent with the things that were different [then] Phan noticed, right? Face is rounder probably heavier, hair is a different brown or not that sort of goldish-blond.
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> You know, *I think that's a pretty good ID. I think it's more than a pretty good ID, I think it is beyond a reasonable doubt that that's her.*

3 RP at 189 (emphasis added). Again, Coleman did not object.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion, and not arguing an inference from the evidence. *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). In closing argument, the State has wide latitude in drawing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

A prosecutor's statements, saying "I think," are not personal opinions where they are supported by the evidence and could be cured through instruction. *State v. Hoffman*, 116 Wn.2d 51, 94, 804 P.2d 577 (1991). In *Hoffman*, the prosecutor utilized phrases such as "I think" or "I think the evidence shows." *Hoffman*, 116 Wn.2d at 94. The court held that the statements were not error because they "contained material which was supported by the evidence and none were

of such nature that any error in the form of the argument could not have been obviated by a curative instruction, had one been requested." *Hoffman*, 116 Wn.2d at 94.

Here, the prosecutor's statements are supported by the evidence. The prosecutor pointed out the consistencies between the officers' testimonies—that they both thought Featherstone had darker hair and seemed heavier in person than in her driver's license. The prosecutor also argued that the officers' willingness to communicate these differences bolstered their credibility because they could have just said they believed it was the same woman. The prosecutor did not give a personal opinion of the witnesses' credibility.

Coleman argues that *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003), is applicable. In *Horton*, the prosecutor stated, "Then you have the defendant. The manner in which he testified, the State believes, this prosecutor believes, that he got up there and lied." *Horton*, 116 Wn. App. at 921. This court held that the statement was error and prejudicial because by expressing a personal opinion, the prosecutor exacerbated an erroneous evidentiary ruling. *Horton*, 116 Wn. App. at 921. *Horton* is distinguishable. First, as stated above, the prosecutor did not express his personal opinion, but was instead arguing a reasonable inference based on the evidence. Second, Coleman does not allege that the error compounded an erroneous evidentiary ruling. *Horton* is not applicable.

Coleman analogizes to *Sargent*. In *Sargent*, the prosecutor repeatedly stated that he "believe[d]" a particular witness. *Sargent*, 40 Wn. App. at 343. This court held the comments were prejudicial error because they (1) bolstered the credibility of the only witness directly linking Sargent to the crime and (2) the comments could not have been cured with an appropriate

instruction. *Sargent*, 40 Wn. App. at 345. The prosecutor's comments in this case are not so egregious. The prosecutor in this case was not expressing a personal opinion, but was rather making an argument based on reasonable inferences from the evidence. In contrast to *Sargent*, an instruction would have cured any perceived prejudice. As in *Hoffman*, any prejudice could have "been obviated by a curative instruction, had one been requested." 116 Wn.2d at 94. *Sargent* is not analogous.

Coleman also analogizes to *McKenzie*, arguing that the supreme court found misconduct in that case where the prosecutor stated "*that is my opinion* about what this evidence shows." *McKenzie*, 157 Wn.2d at 54 (quoting *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956)). However, the portion of *McKenzie* to which Coleman cites is a discussion of an analogous case, *Case*, 49 Wn.2d at 68. *McKenzie* does not address prosecutorial misconduct stemming from an alleged comment on a witness's credibility. Instead, the appellant alleged that the prosecutor improperly commented on his guilt, disparaged him by calling him a rapist, called him a liar, and attempted to inflame the jury's passion. *McKenzie*, 157 Wn.2d at 52-60. *McKenzie* is not analogous.

Coleman failed to demonstrate clear and unmistakable error, that the prosecutor's comments were flagrant and ill-intentioned, or that a curative instruction could not have neutralized any prejudice. Thus, he fails to demonstrate prosecutorial misconduct.

Second, Coleman argues that this court should reverse his conviction because he received ineffective assistance of counsel when his trial attorney failed to object to the prosecutor's statements. As addressed above, the statements were not improper. The prosecutor did not

commit prosecutorial misconduct. Instead, he made reasonable inferences drawn from the evidence. Coleman does not demonstrate ineffective assistance of counsel because there was no prosecutorial misconduct for him to object to.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Penoyar, J.

We concur:

Van Deren, C.J.

Quinn-Brintnall, J.